2014 IL App (2d) 121227-U
No. 2-12-1227
Order filed June 5, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 04-CF-2027
MARLON JOHNSON,	)	Honorable James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition, which alleged ineffective assistance of counsel: counsel's failure to present fingerprint evidence was not prejudicial, as the fact that none of five latent prints matched defendant's was not exculpatory and, in any event, counsel argued to the jury, at least as persuasively, that the State had presented no fingerprint evidence implicating defendant.

¶ 2 Defendant, Marlon Johnson, who, following a jury trial, was convicted of aggravated kidnapping (720 ILCS 5/10-2(a)(5) (West 2002)) and aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2002)), appeals the second-stage dismissal of his postconviction petition. Defendant argues that he is entitled to an evidentiary hearing, because he made a

substantial showing of a constitutional violation. More specifically, defendant claims that he made a substantial showing that his trial counsel was ineffective for failing to obtain and present to the jury evidence that five fingerprints suitable for comparison were found in the car of M.G., the victim, and that none of the fingerprints matched impressions taken from defendant. Defendant contends that such evidence supported his claim at trial that he was never in M.G.'s car, such that, had the jury been presented with such evidence, it would have given less weight to M.G.'s version of events and more weight to his. Because we determine that defendant was not prejudiced by counsel's failure to present such evidence, we affirm the second-stage dismissal of defendant's petition.

¶ 3 This court has previously detailed the evidence presented at defendant's trial and the procedural history of this case. See *People v. Johnson*, No. 2-05-1269 (2007) (unpublished order under Supreme Court Rule 23) (*Johnson I*); *People v. Johnson*, 401 Ill. App. 3d 685 (2010) (*Johnson II*); *People v. Johnson*, 2012 IL App (2d) 111301-U. Thus, we recite here only those facts that are necessary to the disposition of this appeal.

¶ 4 Prior to trial, five latent fingerprint lifts were taken from M.G.'s car. Those lifts were compared to inked fingerprint and palm print standards of defendant, M.G., and two other people who had access to her car. The lifted prints did not match the sample prints taken from defendant, M.G., or the two other people.

¶ 5 At defendant's jury trial, M.G. testified that, on December 17, 2003, she was sitting in her car outside of her apartment building when defendant approached her and asked her for a ride. When M.G. refused, defendant, threatening M.G. with a knife, got into the passenger side of the car and forced M.G. to drive to various places and give him oral sex. M.G. stated that,

while defendant was in her car, he had his hands all over the car door. DNA evidence taken from M.G.'s clothing matched DNA taken from defendant.

¶ 6 Defendant testified that M.G., whom defendant had sold drugs to in the past, approached him about buying drugs on the day in question. Because M.G. had no money, she asked defendant if she could have the drugs now and pay for them once she received her paycheck. Defendant suggested that he give her drugs in exchange for oral sex. M.G. agreed and performed oral sex on defendant in the apartment building where defendant was living. Although defendant left, indicating that he would return with drugs for M.G., defendant never came back. Defendant denied ever being in M.G.'s car and restraining her in any way.

¶ 7 During closing arguments, defense counsel noted that M.G. claimed that defendant repeatedly touched the door of her car. Counsel observed that, despite this testimony, no fingerprint evidence was presented establishing that defendant was ever in the car.

¶ 8 After the jury began deliberations, the jury sent a note to the court, asking if the jury could consider the fact that M.G.'s car was impounded and no fingerprints were found. The jury was advised that it had before it all of the admissible evidence. The jury found defendant guilty, and the court sentenced him to a total of 18½ years' imprisonment.

¶ 9 Defendant appealed, and this court affirmed. See *Johnson I*, No. 2-05-1269 Defendant petitioned for postconviction relief, arguing, among other things, that he was denied the effective assistance of counsel when his attorney failed to investigate or present evidence concerning fingerprints found in M.G.'s car. Counsel appointed for defendant moved to withdraw, and the court granted the motion. The State moved to dismiss, and the court granted that motion. Defendant appealed, and this court vacated the dismissal of defendant's petition and reversed the trial court's order allowing postconviction counsel to withdraw. *Johnson II*, 401 Ill. App. 3d at

697. In doing so, we observed that "[t]rial counsel's *** apparent failure to obtain the [fingerprint] reports *arguably* fell below an objective standard of reasonableness because [counsel] appeared to be unaware of their existence despite references to them in documents in the common-law record prior to his appointment, as well as in prior hearing[s]."[1] (Emphasis in original.) *Id.* at 696. We went on to note that, because counsel did not have the reports prior to trial, his failure to use them at trial could not be seen as trial strategy. *Id.* Moreover, we stated that defendant was "*arguably* prejudiced because the results showing that his fingerprints did not match those found in the car could lend some support to the defense theory that defendant was not in M.G.'s car and that the encounter took place in the laundry room." (Emphasis in original.) *Id.*

¶ 10 On remand, defendant filed an amended petition, claiming, among other things, that trial counsel was ineffective for failing to present the fingerprint evidence and that appellate counsel was ineffective for failing to raise this argument on direct appeal. The State moved to dismiss, claiming, among other things, that defendant was not prejudiced by trial counsel's failure to introduce the evidence. In making this argument, the State noted that counsel argued during closing arguments that no fingerprint evidence was found in M.G.'s car and that the State did not rebut this claim.

¶ 11 The court granted the State's motion to dismiss. Defendant moved to reconsider, the court denied that motion, and this timely appeal followed.

[1] We employed the standard that applies to a first-stage dismissal, because that standard also applied to the issue raised, *i.e.*, whether counsel should have been allowed to withdraw at the second stage. *Id.* at 694.

¶ 12 At issue in this appeal is whether the second-stage dismissal of defendant's petition was proper. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-stage process for the adjudication of postconviction petitions and permits a defendant to mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183 Ill. 2d 213, 222 (1998). If a petition survives first-stage review, it proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If the court does not dismiss or deny the petition, the petition advances to the third stage, where the court conducts an evidentiary hearing. *Id.*

¶ 13 Here, defendant's petition was dismissed at stage two. An appeal from a second-stage dismissal is reviewed *de novo*. *People v. Adams*, 373 Ill. App. 3d 991, 993 (2007). At the second stage, a defendant must make a "substantial showing" of a constitutional violation. *People v. Addison*, 371 Ill. App. 3d 941, 946 (2007). In determining whether a defendant has made a substantial showing of a constitutional violation, "all well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient." *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 14 To succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). To satisfy the first part of the test, a defendant must show that his attorney's performance fell below an objective standard as measured by prevailing professional norms. *People v. Miller*, 346 Ill. App.

3d 972, 982 (2004). Decisions involving judgment, trial strategy, or trial tactics will not support a claim of ineffective assistance of counsel. *People v. Lindsey*, 324 Ill. App. 3d 193, 197 (2001).

¶ 15 However, an attorney does not employ valid trial strategy where, among other things, he fails to conduct a reasonable investigation. *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008). Attorneys are obligated to explore all readily available sources of evidence that might benefit their client. *Id.* The failure to investigate and develop a defense, as well as the failure to present available witnesses to corroborate a defense, have been found to be ineffective assistance of counsel, because defense counsel has a legal and ethical obligation to explore and investigate a client's case. *Id.* Whether defense counsel's failure to investigate amounts to ineffective assistance of counsel is determined by the value of the evidence that should have been presented and the closeness of the evidence that was presented. *People v. English*, 334 Ill. App. 3d 156, 164 (2002).

¶ 16 Here, as to the first part of the *Strickland* test, *i.e.*, whether counsel's performance was objectively reasonable, the record, when viewed in a light most favorable to defendant, establishes that counsel did not know about, or at least failed to investigate further, the report indicating that defendant's fingerprints did not match those lifted from M.G.'s car. As a result, counsel failed to call as a witness the forensic scientist who conducted the fingerprint comparison test, present the report to the jury, or otherwise present evidence concerning the lack of fingerprint evidence. Counsel's failure to discover and present this evidence was deficient, as "it cannot be seriously contended that defendant's attorney[] made a reasonable strategic decision not to present evidence of which [he was] unaware." *People v. Kubat*, 114 Ill. 2d 424, 447 (1986) (Simon, J., dissenting); see also *People v. Truly*, 230 Ill. App. 3d 948, 954 (1992) (counsel's failure to speak to witnesses who could have provided an alibi defense was not

strategic, as "counsel *** admitted that he had made no contact with the witnesses and did not know what the content of their testimony might be").

¶ 17 However, even though counsel's performance might satisfy the first prong of *Strickland*, *i.e.*, it is deficient, that does not mean that counsel was ineffective. Rather, a defendant must establish both prongs of *Strickland*. *Strickland*, 466 U.S. at 697. As the Court explained in *Strickland*, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution," as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691-92. A defendant establishes prejudice by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶ 18 Here, we cannot conclude that defendant was prejudiced by his counsel's inaction. Illustrative of this point is *People v. Peeples*, 205 Ill. 2d 480 (2002). There, as in this case, the defendant filed a postconviction petition, arguing, among other things, that his trial counsel was ineffective for failing to present evidence that fingerprints found at the murder scene did not belong to the defendant. *Id.* at 500. The defendant argued that, had the jury been presented with this evidence, it could have reasonably found the defendant not guilty, as the defendant alleged that the fingerprints were left by the actual offender. *Id.* The trial court summarily dismissed the petition, and the defendant appealed. *Id.* at 508.

¶ 19 Our supreme court affirmed. *Id.* at 557. In doing so, the court observed:

> "The absence of defendant's fingerprints from the victim's apartment does not, as defendant contends, necessarily constitute 'exculpatory' evidence which 'exonerates' him

> from the crimes. Contrary to the argument advanced by [the] defendant, the lack of his fingerprints at the crime scene does not establish that [the] defendant was not in the apartment; instead, it may indicate that he either was careful not to leave fingerprints or that any fingerprints that were left were unsuitable for comparison. In addition, the recovery of latent prints from the victim's apartment which did not match the victim, [other people who had access to the apartment], or [the] defendant does not lead to the conclusion advocated by defendant that the prints were those of the 'actual offender.' To the contrary, the jury could have attributed many innocent explanations to the recovery of the fingerprints, including that they were left by visitors who had been invited into the apartment." *Id.* at 538.

¶ 20 As in *Peeples*, we cannot conclude that the result of defendant's trial might have been different had the jury been presented with evidence that latent prints taken from M.G.'s car did not match fingerprint samples taken from defendant. As in *Peeples*, the possible reasons for the latent prints not matching defendant's prints were many, with most having nothing to do with whether defendant was actually in M.G.'s car. That is, as in *Peeples*, the fact that defendant's prints were not found in M.G.'s car could be attributable to the fact that defendant did not leave any fingerprints that were suitable for comparison. *Id.* In our view, this position is strengthened by the fact that the latent prints also did not match three other people who had been in the car, including M.G. herself.

¶ 21 Further, as the State points out, counsel argued that, despite the evidence that defendant repeatedly touched the door, the State presented no fingerprint evidence. According to defendant, "arguing that there were *no* fingerprints is dramatically different from being able to argue that there were in fact five fingerprints found in a case where the complainant claimed that

the perpetrator repeatedly touched her car and articles within it, and not a *single one of those* five fingerprints matched the defendant." (Emphases in original.) However, we believe that arguing broadly, as counsel did here, versus pinpointing that none of the five fingerprints found matched defendant, only benefited defendant. Because none of the five prints matched even M.G., the fact that none matched defendant was not particularly powerful. Counsel's argument that the State presented no fingerprint evidence, when the circumstances suggested that the State should have done so, was more persuasive.

¶ 22 Given all of this, we conclude that, although counsel was deficient in not discovering or further investigating the fingerprint evidence, counsel's failure to present that evidence at trial did not prejudice defendant. Thus, defendant has not made a substantial showing of a constitutional violation, and we affirm the trial court's second-stage dismissal of defendant's petition.

¶ 23 For these reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 24 Affirmed.